Supreme Court, U.S.
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No. 10-356

In The

Supreme Court of the United States

LLOYD PHILLIP LOCKE,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a defendant's *Miranda* rights waiver and subsequent confession should be excluded from evidence as involuntary and coerced, where it followed directly from a coerced consent to search his residence.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are Petitioner himself and the State, represented by the California Attorney General.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY 3

ARGUMENT 5

A PRIOR COERCED CONSENT TO SEARCH, WITH NO INTERVENING EVENT TO BREAK THE STREAM OF EVENTS, REQUIRES THAT THE SUBSEQUENT *MIRANDA* WAIVER ALSO BE DEEMED INVOLUNTARY 5

CONCLUSION 10

APPENDIX

Memorandum Opinion of the Circuit Court of Appeals, May 27, 2010 (No. 09-16045) ..... App. 1

Order of the District Court, May 7, 2009 (2:07-cv-0130) ..... App. 5

District Court Findings and Recommendations, March 27, 2009 (2:07-cv-0130) ..... App. 7

TABLE OF CONTENTS – Continued

Page

Opinion of the California Court of Appeal, Third Appellate District, April 28, 2006 (No. C048693).....App. 28

Order Denying Rehearing and Rehearing *En Banc* on June 25, 2010 (No. 09-16045).....App. 42

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Brown v. Illinois, 422 U.S. 590 (1975) 4

Clewis v. Texas, 386 U.S. 707 (1967) 4, 6, 7, 8

Colorado v. Connelly, 479 U.S. 157 (1986) 3

Edwards v. Arizona, 451 U.S. 477 (1981) 8

Lyons v. Oklahoma, 322 U.S. 596 (1944) 8

Maryland v. Shatzer, 130 S.Ct. 1213 (2010) 8

Miranda v. Arizona, 384 U.S. 486 (1966) ..... *passim*

Oregon v. Elstad, 470 U.S. 298 (1985) 9

Reck v. Pate, 367 U.S. 433 (1961) 7

Smith v. Illinois, 469 U.S. 91 (1984) 4

United States v. Bayer, 331 U.S. 532 (1947) 7, 9

Wong Sun v. United States, 371 U.S. 471 (1963) 4, 6, 9

FEDERAL CONSTITUTION

U.S. Const. amend. V 2

U.S. Const. amend. VI 2

U.S. Const. amend. XIV 2

FEDERAL STATUTES

28 U.S.C. § 1651 1

28 U.S.C. § 2253 2

28 U.S.C. § 2254 1

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

Cal. Penal Code § 1252.....6

PETITION FOR WRIT OF CERTIORARI

Petitioner, LLOYD PHILLIP LOCKE, respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, No. 09-16045, May 26, 2010, affirming the denial of his habeas corpus petition. Petitioner's petition for rehearing and rehearing *en banc* was denied by the Court of Appeals on June 25, 2010.

OPINIONS BELOW

Attached to this Petition are: the Memorandum Opinion of the Circuit Court of Appeals, May 27, 2010 (No. 09-16045; App. 1); the Order of the District Court adopting the Findings and Recommendations and denying the habeas corpus petition on May 7, 2009 (2:07-cv-0130; App. 5); the Findings and Recommendations filed in the District Court on March 27, 2009 (2:07-cv-0130; App. 7); the opinion of the California Court of Appeal, Third Appellate District, April 28, 2006, affirming the state court conviction (No. C048693; App. 28); the Order Denying Rehearing and Rehearing *En Banc* on June 25, 2010 (No. 09-16045; App. 42).

STATEMENT OF JURISDICTION

This Court has jurisdiction on certiorari pursuant to 28 U.S.C. § 1651. The district court had jurisdiction in habeas corpus under 28 U.S.C. § 2254. The

Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 2253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns the exclusion of involuntary coerced confessions and the coerced waiver of the right to remain silent and the right to counsel. The issue is governed by the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution, "[n]o person shall be compelled in any criminal case to be a witness against himself . . . ," as well as the Right to Counsel Clause of the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," and the Due Process Clause of the Fourteenth Amendment, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner was convicted after a court trial in the California Superior Court, County of Sacramento. (No. 03F08925.) His conviction was affirmed by the California Court of Appeal. (No. C048693.)

Petitioner sought habeas corpus relief in the United States District Court for the Eastern District

of California. Relief was denied in the district court, but an appeal was allowed to the Circuit Court of Appeals for the Ninth Circuit. (No. 09-16045.)

At all stages of the proceedings petitioner argued that his confession should be excluded from evidence because his *Miranda* rights waiver[1] and confession were involuntary and coerced. The Circuit Court of Appeals, App. 4, held that "[a]lthough the trial court held that defendant's consent to search his home was involuntary, the record supports the determination that when he confessed, the defendant clearly wanted to tell the officers his side of the story, willingly gave extensive information, and never indicated that he did not want to speak to the officers. [Citing *Colorado v. Connelly,* 479 U.S. 157, 167 (1986).]"

SUMMARY

The Circuit Court of Appeals correctly cited *Colorado v. Connelly, supra,* for the proposition that there must be evidence of police coercion in order for a court to order suppression of a defendant's confession. However, there was a finding of police coercion here, in the involuntary consent to search his house two hours earlier, and this finding has never been challenged or contested by the state.

[1] *Miranda v. Arizona*, 384 U.S. 486 (1966).

Given the predicate finding of coercion, the Circuit Court of Appeals incorrectly pointed to the defendant's willingness to speak to the officers and his failure to continue his resistance to interrogation. Where there has been an initial invocation of the right to remain silent, an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. *Smith v. Illinois,* 469 U.S. 91, 100 (1984). Surely the same rule – later willingness to speak under pressure does not erase the earlier illegal coercion – should apply where the *Miranda* waiver itself was coerced.

The question presented by this Petition is whether the effect of the initial coercion may be dissipated where there has been no intervening break in the stream of events. This Court has held that absent such a break the later statement is not insulated from the earlier coercion. *Clewis v. Texas,* 386 U.S. 707, 710 (1967). Indeed, where statements are derived from an illegal arrest, a later confession is only admissible if it is both voluntary and an act of free will sufficient to purge the primary taint. *Brown v. Illinois,* 422 U.S. 590, 602 (1975); *Wong Sun v. United States,* 371 U.S. 471 (1963).

The present case indicates that this Court's rules on coerced confessions are either unclear or are only honored in the breach. In either event, certiorari review should be granted.

ARGUMENT

A PRIOR COERCED CONSENT TO SEARCH, WITH NO INTERVENING EVENT TO BREAK THE STREAM OF EVENTS, REQUIRES THAT THE SUBSEQUENT *MIRANDA* WAIVER ALSO BE DEEMED INVOLUNTARY.

The state trial court found that the defendant's consent to search his house was coerced and involuntary, and ordered the suppression of the evidence seized during that search.[2] Petitioner waived his

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[2] The state trial court held as follows with respect to the coerced consent to search:

> "A review of the transcripts reveals no less than 28 times Mr. Locke evaded, refused, or questioned Detective Bielcik's request for full consent.
>
> "In response to his repeated question, 'Will you give consent,' Mr. Locke said, 'For what?' 'I'd like to be there.' 'I just don't want you going over there at all.' 'I don't want to authorize a search without me being there.' 'It seems excessive to search my house.' 'If I don't have to, I would rather not.' 'I'd rather not.' 'They've already been in the house.' 'If I can be there when you do it.' 'What are you looking for?' 'You want me to consent without being there?' When do you want to search?'
>
> "He said, 'Before they decide to take a look, I would like to figure out when I'm going to get out.' 'I want to go back and check.' 'I don't want to make that decision until I know when I'm getting out.' 'How long would it take for a search warrant?' 'You're not going to release me until you see the house.' 'Why not search before?' 'Did someone make a mistake?' 'Did they have me sign the wrong paper?' 'Why are we doing this again?' He asked 'why' again.

(Continued on following page)

Miranda privilege some two hours later, at the behest of the same detective who coerced the earlier consent to search, while seated in the same interrogation room. The only intervening event was the illegal search.

This sequence of events presents an important issue for decision by this Court: whether the Court's doctrine that a subsequent confession must be excluded from evidence where it follows an earlier coerced statement with no intervening break in the stream of events (*Clewis v. Texas, supra*), and the Court's doctrine of exclusion of "fruit of the poisonous tree" of prior illegal police conduct (*Wong Sun v. United States, supra*) extends to these circumstances.

The question here is whether one act of coerced consent [to search], plus the performance of the illegal search itself, taints a later consent [to speak to the detective]. Despite the holdings of lower courts in this case, there can be only one answer: the earlier

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> "He asked, 'Was the prior consent legally obtained?' He suggested the first one must not have been lawful. 'Did they mess up the first time?' 'I don't understand why I have to sign again.' 'Seems like they made a mistake.' 'It seems it was not legal.'
>
> "At this point the defendant did sign, but the Court finds he no longer felt free to decline the repeated requests; and, therefore, the Court is ruling that consent was not voluntary."

R.T. 243-244, transcript of August 23, 2004.

Although this ruling could have been challenged by the state in the course of the state appeal, see Cal. Penal Code § 1252, it was not.

coercion taints the later consent, unless and until there is a significant break in the chain of events connecting the two consents.

This Court has held that the effect of an earlier coerced *Miranda* waiver determines the voluntariness of a later *Miranda* waiver, where there has been no intervening break in the stream of events. As held in *Clewis v. Texas,* 386 U.S. 707, 710 (1967),

> On this record, we cannot hold that petitioner's third statement was voluntary. It plainly cannot, on these facts, be separated from the circumstances surrounding the two earlier "confessions." *There is here no break in the stream of events from the time Sunday morning when petitioner was taken to the police station to the time Tuesday morning some nine days later that he signed the statement in issue, sufficient to insulate the statement from the effect of all that went before.* Compare *United States v. Bayer,* 331 U.S. 532, 540 (1947) with *Reck v. Pate,* 367 U.S. 433, 444 (1961).
>
> Emphasis added.

Simply put, petitioner asks that the Court give the same or similar protections to suspects who have been coerced into an earlier involuntary consent to search, as the Court has granted to those defendants who have been coerced into an earlier involuntary *Miranda* waiver.

For that matter, petitioner suggests that the Court give the same or similar protections to suspects

who were coerced into rights waivers, as the Court has granted to those defendants who, though not coerced, were savvy enough to assert the *Miranda* privilege.

This term the Court has addressed that very issue: the continuing or penumbral effect of a prior *Miranda* invocation on a later interrogation and waiver. See *Edwards v. Arizona,* 451 U.S. 477 (1981). In *Maryland v. Shatzer,* 130 S.Ct. 1213 (2010), the Court set a bright-line rule of fourteen days for dissipation of the effect of the earlier invocation.

For purposes of petitioner's argument, the significance of *Maryland v. Shatzer* lies in the factors which illuminated the Court's reasoning. In the view of the *Shatzer* court, a time period of fourteen days is appropriate because it "provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." 130 S.Ct. at 1223.

Petitioner proposes a rule which measures the taint of a prior coerced consent to search by the following guideposts: (1) Whether there has been a break in the stream of events sufficient to insulate the later incriminating statement from the coercion that preceded it. See *Clewis v. Texas, supra,* 386 U.S. at 710, and *Maryland v. Shatzer, supra*; (2) Whether "inferences as to the continuing effect of the coercive practices" may be fairly drawn "from the surrounding circumstances." See *Lyons v. Oklahoma*, 322 U.S. 596,

602-603 (1944); (3) How much time passed between the first coercive event and the later confession, whether there was a change in the place of interrogation, and whether there was a change in interrogators. See *Oregon v. Elstad*, 470 U.S. 298, 310 (1985); (4) Whether the conditions which produced the first consent were removed before the subsequent waiver and confession. See *United States v. Bayer*, 331 U.S. 532, 540-541 (1947).

These factors, drawn from coerced confession cases, are quite similar to those which the Court in *Wong Sun* used to enunciate the "fruit of the poisonous tree" doctrine with respect to the effect of illegal police conduct such as searches without probable cause. The present case is a cross-over phenomenon in which the confession was coerced by reason of an earlier coerced consent to search and a resulting illegal search. All the above factors, plus the *Wong Sun* factors, should be coordinated.

Properly applied here, the analysis would require the exclusion of the confession. The time gap between the coercion and the waiver was two hours – a short period by any standard; the coercive effects did not change – indeed they became worse once the defendant knew that his house had been (illegally) searched; petitioner remained seated in the same interrogation room, confronted by the same detective who had coerced the earlier consent to search – see footnote 2 above; and none of the coercive conditions had changed – there was no "break in the chain of

events" which produced the earlier coerced consent to search.

A single analysis should be formulated and applied to assess the effect of illegal police conduct. Certiorari review must be granted.

CONCLUSION

For the reasons stated, certiorari review must be granted and Petitioner must be granted relief in habeas corpus.

Date: September 13, 2010

Respectfully submitted,

CHARLES M. BONNEAU
Attorney for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LLOYD PHILLIP LOCKE, Petitioner-Appellant, v. MICHAEL EVANS, Respondent-Appellee.	No. 09-16045 D.C. No. 2:07-cv-00130-MCE-CHS MEMORANDUM* (Filed May 27, 2010)

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, District Judge, Presiding

Argued and Submitted May 10, 2010
San Francisco, California

Before: HUG, RYMER and McKEOWN, Circuit Judges.

Lloyd Phillip Locke ("defendant"), a California state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his 49-year sentence for committing lewd acts upon a child and making a criminal threat using a firearm. We review the district court's denial of a habeas petition de novo and its factual findings for clear error. *Correll v. Ryan*, 539 F.3d 938, 942 (9th Cir.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

2008). Because the defendant's habeas petition was filed after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies. *Woodford v. Garceau,* 538 U.S. 202, 204, 207 (2003). Under AEDPA, we may only grant relief if the last reasoned state court decision was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court law, or was "an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d). We affirm.

Defendant contends that his *Miranda* rights were violated because the police continued to question him after he allegedly invoked his right to remain silent. Police are required to give the warnings that *Miranda* requires to any suspect subject to custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436, 478-79 (1966). After *Miranda* warnings have been given, police questioning must cease if the suspect indicates that he wishes to remain silent. *DeWeaver v. Runnels,* 556 F.3d 995, 1000 (9th Cir. 2009) (quoting *Miranda,* 384 U.S. at 473-74). To invoke his right to remain silent, a suspect's invocation at a minimum must not be "so equivocal or unclear that 'a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking' his right to remain silent." *United States v. Shi,* 525 F.3d 709, 729 (9th Cir. 2008) (quoting *Arnold v. Runnels,* 421 F.3d 859, 866 (9th Cir. 2005)).

In this case, the California Court of Appeal properly determined that the defendant did not

invoke his right to remain silent. Defendant was *Mirandized* and when asked if he understood his rights stated "No." Defendant's response that he did not understand his rights would not indicate, even equivocally, to a reasonable officer that he was invoking a right to silence. *See Deweaver,* 556 F.3d at 1000-02 (holding that a request to go back to jail was not an invocation of the right to remain silence). Defendant's further responses would not suggest to a reasonable officer that he was invoking his right to silence. *See id.* Thus, we hold that the California Court of Appeal's decision that the defendant did not invoke his right to remain silent was not contrary to, or an unreasonable application of, clearly established Supreme Court law. *See id.*

Defendant argues that his confession was involuntary because the state court found that his consent to search his home was involuntary. The voluntariness of a confession is determined by the totality of the circumstances, including any traits of the accused and all details of the interrogation. *Schneckloth v. Bustamonte,* 412 U.S. 218, 226 (1973). However, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment," *i.e.,* a confession must be the result of coercive police conduct to be involuntary. *Colorado v. Connelly,* 479 U.S. 157, 167 (1986).

Here, the California Court of Appeal's determination that defendant's confession was voluntary was not contrary to, or an unreasonable application of,

federal law, nor is it an unreasonable determination of the facts in light of the evidence. Although the trial court held that defendant's consent to search his home was involuntary, the record supports the determination that when he confessed, the defendant clearly wanted to tell the officers his side of the story, willingly gave extensive information, and never indicated that he did not want to speak to the officers. *See id.*

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LLOYD PHILLIP LOCKE,
Petitioner,
vs.
MICHAEL EVANS,
Respondent.
/

No. 2:07-cv-00130-MCE-CHS P

ORDER

(Filed May 8, 2009)

Petitioner, a state prisoner proceeding pro se, filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On March 26, 2009, the magistrate judge signed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner filed timely objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations signed March 26, 2009 are adopted in full; and

2. Petitioner's application for a writ of habeas corpus is denied.

Dated: May 7, 2009

/s/ Morrison C. England, Jr.
MORRISON C. ENGLAND, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LLOYD PHILLIP LOCKE,
Petitioner,
vs.
MICHAEL EVANS,
Respondent. /

No. CIV S-07-0130 MCE CHS P

FINDINGS AND RECOMMENDATIONS

(Filed Mar. 27, 2009)

I. INTRODUCTION

Petitioner Lloyd Phillip Locke is a state prisoner proceeding through counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. He challenges the 2004 judgment of conviction entered in the Sacramento County Superior Court, case number 03F08925. Petitioner alleges that his custodial confession was illegally obtained. Specifically, he asserts that he invoked his right to silence during an exchange with Deputy Oania, after which Detective Bielcik improperly reinitiated questioning. Petitioner alleges that his statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and also that they were involuntary.

II. BACKGROUND

The following background summary was set forth in the unpublished opinion of the California Court of Appeal, Third District, case number C048693.[1]

> Following a fight with her father (the defendant), the 17-year-old victim reported he had assaulted her with a knife and a stick, had pointed guns at her, and had fired at least one of them. She drew a map of the house, identifying where the weapons could be found, and consented to a search of the house for weapons. She also told officers defendant had been sexually molesting her since she was five.
>
> Deputies contacted defendant around 3:30 p.m. He admitted threatening his daughter with a knife and admitted drinking whisky after fighting with her. He had a strong odor of alcohol, spoke quickly, and moved from side to side as he spoke.
>
> Placed under arrest for assault with a deadly weapon, making criminal threats, and child abuse, defendant consented to a search of the house for weapons.
>
> When Deputy Oania read defendant his *Miranda* rights and asked if he understood them, defendant responded, "No." Deputy Oania checked the "No" box on the written *Miranda* advisement form next to the question, "Do

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[1] Lodged in this record as Doc. 3 on 6/04/07.

you understand each of these rights I have explained to you?" and wrote "Oania" on the form. Deputy Oania did not question defendant further.

Deputies searched the house, located the knife and stick where both defendant and his daughter had indicated they could be found, found three firearms, and discovered bullet holes inside the residence.

Meanwhile, defendant remained in custody and Detective Bielcik, aware of the allegations of sexual abuse, pressed defendant to provide consent to an unrestricted search of the house. At approximately 7:20 p.m., defendant consented to an unrestricted search of the house.

Deputies conducted a second, complete search of the house between approximately 8:00 and 10:00 p.m., during which they seized homemade videotapes depicting sex acts.

Simultaneously, Detective Bielcik began to interview defendant. Defendant reported he had snorted $20 worth of crank at about 2:00 a.m. that morning, drank about four ounces of whiskey shortly after noon, smoked marijuana at about 3:00 in the afternoon, but stated he no longer felt under the influence of any substance. At about 9:30 p.m., Detective Bielcik re-*Mirandized* defendant. Bielcik "slowly" read the advisement form to defendant, who responded that he understood his rights. Defendant said, "I'll talk to you,"

signed the waiver form, and initialed statements that he understood his rights and, with those rights in mind, wished to speak to officers.

Defendant then told Detective Bielcik that he and the victim were consensual "sexual partners" and had engaged in sex acts "uncountable times," beginning when she was six and a half years old and continuing until the day before his arrest.[2]

He was charged with 39 counts of sex offenses committed between 1991 and 2003 (including rape, lewd acts, and oral copulation), two counts of felony assault, and one count of making a criminal threat.

Defendant moved to suppress (1) the non-weapon evidence seized from his home and (2) his confession to Detective Bielcik, arguing that his statements and his second, unqualified consent to search were involuntary products of coercion by Detective Bielcik. He also asserted that he had invoked his right to remain silent when he received the first *Miranda* advisements from Deputy Oania, thereby rendering unlawful Detective Bielcik's reinitiating questioning.

After a hearing, the trial court granted defendant's motion to suppress evidence found in the second search of his house, on the

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[2] The victim was pregnant at the time of defendant's arrest, and tests later established defendant was the father.

> ground defendant's unqualified consent to search his house was involuntary because defendant consented only after trying "no less than 28 times" to avoid doing so, thereby compelling the inference defendant "no longer felt free to decline the repeated requests[.]"
>
> But the court denied defendant's motion to suppress his statements to Detective Bielcik. The court noted that when defendant was first read his *Miranda* rights by Deputy Oania in the afternoon, he showed evidence of intoxication and neither invoked his right to remain silent nor requested an attorney. After several hours had passed and "the effects of the alcohol and drugs [were allowed] to dissipate," Detective Bielcik did not act improperly in re-*Mirandizing* defendant, or in taking his statement after defendant responded "I'll talk to you" and signed the waiver.

(C048693 opinion at 1-2.)

On December 21, 2004, petitioner pleaded no contest to four counts of committing forcible lewd acts on a child, two counts of committing non-forcible lewd acts on a child, and one count of making a criminal threat, during which he personally used a firearm.[3] In

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[3] The court later granted petitioner's request to withdraw his plea and to enter a "slow plea on stipulated facts" to the same charges, with the same stipulated sentence, so as to

(Continued on following page)

exchange, the prosecution agreed to dismiss the other 35 counts alleged in the information. Petitioner was sentenced to the stipulated sentence of 49 years. (C048693 opinion at 2.)

III. APPLICABLE LAW FOR FEDERAL HABEAS CORPUS

An application for writ of habeas corpus by a person in custody under judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. §2254(a); *see also Peltier v. Wright*, 15 F.3d 860, 861 (9th Cir. 1993); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (*citing Engle v. Isaac*, 456 U.S. 107, 119 (1982)). This petition for writ of habeas corpus was filed after the effective date of, and thus is subject to, the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *see also Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999). Under AEDPA, federal habeas corpus relief also is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

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preserve his right to challenge the issues presented in this petition. (C048693 opinion at 2.)

> determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *see also Penry v. Johnson*, 532 U.S. 782, 792-93 (2001); *Williams v. Taylor*, 529 U.S. 362, 402-03 (2000); *Lockhart v. Terhune*, 250 F.3d 1223, 1229 (9th Cir. 2001).

The "contrary to" and "unreasonable application" clauses of §2254(d)(1) are different. Under the "contrary to" clause of §2254(d)(1), a federal court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides the case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405. As the Third Circuit has explained, "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent *requires* the contrary outcome." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3rd Cir. 1999) (en banc) (emphasis in original). The state court is not required to cite the specific controlling test or Supreme Court authority, so long as neither the reasoning nor the result of the state court decision contradict either. *Early v. Packer*, 537 U.S. 3, 8-9 (2002).

The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle but unreasonably applies it to the facts of the particular case. *Williams*, 529 U.S. at 410. The focus of this inquiry is whether the state court's application of clearly established federal law is objectively unreasonable. *Id.* "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*

This court will look to the last reasoned state court decision in determining whether the law applied to a particular claim by the state courts was contrary to the law set forth in the cases of the United States Supreme Court or whether an unreasonable application of such law has occurred. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 919 (2003). If relief is precluded by 28 U.S.C. §2254(d), the court may deny the petition without addressing the merits of the claim. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

IV. ANALYSIS OF PETITIONER'S CLAIMS

A. Invocation of the right to remain silent

When a person in custody is subjected to interrogation, he must first be read his *Miranda* rights in order for the information obtained to be admissible in

court. *Miranda v. Arizona,* 384 U.S. 436, 467-68 (1966). If the suspect invokes either his right to silence or his right to an attorney, then that invocation must be "scrupulously honored," and all further interrogation must cease immediately. *Id.* at 479.

Prior to commencement of petitioner's trial, the court held an evidentiary hearing on the defense's motion to suppress the confession. The following evidence was adduced.

While riding his motorcycle on the day in question, petitioner was pulled over by Deputy Oania at approximately 3:30 p.m. (RT at 62.) When asked whether he knew where his daughter was, petitioner stated that she ran out of the house after he tried to force her to talk by holding a knife to her chest. (RT at 64.) He had a strong odor of alcohol on his breath. (RT at 65-66.) Petitioner stated he had consumed Jack Daniels after the argument with his daughter. (RT at 66.) Petitioner was arrested and transported to the police station. (RT at 66-69.) A small brass smoking pipe was recovered from his possession. (RT at 67.) At the station, Oania read him his *Miranda* rights, and asked whether he understood them. (RT at 71) Petitioner responded "no." (RT at 71.) Oania did not question him further. (RT at 72.)

Petitioner was transported to another location. (RT at 72.) Later that evening, Detective Bielcik interviewed him. The interview was videotaped and later transcribed. (RT at 172, 266-67; CT at 342-380.) Bielcik testified he was aware that petitioner had

previously indicated he did not understand his rights and that no *Miranda* waiver had been obtained. (RT at 172.) Bielcik first obtained petitioner's consent for a full search of the home. (RT at 177.) The trial court later found that petitioner evaded, refused, or questioned Bielcik's request for consent to a full search 28 times and ruled that the consent was not voluntarily given because it appeared that petitioner no longer felt free to decline Bielcik's repeated requests, and granted petitioner's motion to suppress the fruits of the search. (RT at 244.)

Bielcik then asked several background questions unrelated to the investigation. Petitioner indicated he had ingested a gram of "crank" at 2:00 a.m. the night before, drank four ounces of whiskey at 12:45 p.m. that day, and smoked marijuana at 3:00 p.m. (CT at 349-52.) In petitioner's opinion, he was no longer under the influence of any of these substances. (CT at 352.)

Bielcik stated that he wanted to give petitioner a chance to tell his side of the story. (CT at 353.) Petitioner asked to speak to [victim], but Bielcik told him that wouldn't happen for a long time. (CT at 353-54.) Bielcik then slowly read petitioner his *Miranda* rights and this time, petitioner stated that he understood his rights (RT at 172; CT at 354), and that he would talk to Bielcik. (CT at 354.) Shortly after that, petitioner admitted to having intercourse with his daughter "uncountable" times and gave a detailed chronology of their sexual history. (CT at 356-64.)

The trial court found that petitioner did not invoke his right to remain silent, and denied the motion to suppress the confession. (RT at 244, 247.) The trial court reasoned:

> the defendant never indicated a desire to remain silent. He simply said he didn't understand his rights. He was re-advised – re-advised, and signed the waiver without questioning it as he had so thoroughly questioned re-signing the consent to search form. [¶] Several hours had passed. This allowed him to calm down from the excitement of yelling at his daughter to the extent he had lost his voice. It also allowed the effects of the alcohol and drugs to dissipate. [¶] And it was a second officer talking about the allegations of sexual abuse when the first officer, Oania, had originally contacted the defendant on the physical assault. . . . [T]here is no showing of gamesmanship as it relates to *Miranda*.

(RT at 246.)

On direct review, the California Court of Appeal, Third District, agreed with the trial court, noting:

> Although a suspect's assertion of the privilege against self-incrimination need not be "unequivocal" (*People v. Thompson*) (1990) 50 Cal.3d 134, 165) or "invoked with unmistakable clarity" (*People v. Randall* (1970) 1 Cal.3d 948, 955, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17), it must be something more than

"metaphorical," as defendant suggests. The court found defendant "never indicated a desire to remain silent" and "did not invoke his right to remain silent." Viewed in context, we agree with the court that defendant's "no" response when asked if he understood the recitation of his *Miranda* rights did not constitute an invocation of his right to silence. In fact, defendant's response to Deputy Oania cannot be characterized even as an equivocal assertion of that right.

Far from suggesting a subtle use of metaphors, evidence supports the court's finding defendant may have failed to understand the *Miranda* advisements because he was intoxicated. The court credited Deputy Oania's observations that – when first advised of his *Miranda* rights – defendant smelled of alcohol, spoke quickly, and moved from side to side, and found defendant was then "under the influence . . . [and] highly agitated." Defendant himself admitted he had been drinking a few hours before.

Defendant insists we must construe his response as an invocation because "the patrol officers who had contact with [defendant] treated it as an invocation" and Detective Bielcik likewise "operated under the assumption that there had been an invocation" by defendant upon his first advisement in the afternoon. Our review of the record is to the contrary: nothing in the record indicates any officer believed defendant ever invoked his right to remain silent.

> Instead, like the trial court, we infer from the fact that defendant was not interrogated after Deputy Oania attempted to advise him of his rights that Oania believed defendant could not evaluate *whether* to waive his right to remain silent, not that he *had* invoked it. Officers properly refrained from addressing the matter further with defendant until defendant "had a chance to calm down . . . [and] sober up[,]" and could understand the recitation of *Miranda* advisements . . . Indeed, had Deputy Oania proceeded with further attempts to *Mirandize* defendant and/or take his statement, he might have exposed deputies to a claim they attempted to exploit defendant's intoxicated state.
>
> There was no *Miranda* violation.

(C048693 opinion at 7-9.)

The United States Supreme Court has made clear that in order to invoke the right to counsel, a suspect must make an *unambiguous* request for an attorney, articulating his desire sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. *Davis v. Unites States,* 512 U.S. 452, 459 (1994). Neither the Supreme Court nor the Ninth Circuit has specifically imported the *Davis* standard for invocation of the right to counsel into the right to silence context. *United States v. Shi,* 525 F.3d 709, 729 (9th Cir. 2008); *Evans v. Demosthenes,* 98 F.3d 1174, 1176 (9th Cir.1996).

With respect to invoking the right to silence, it is not required that a suspect "provide any statement more explicit or more technically-worded than 'I have nothing to say.'" *Arnold v. Runnels,* 421 F.3d 859, 865 (9th Cir. 2005). Still, "at a minimum, such invocation must not be so equivocal or unclear that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking his right to remain silent." *Shi,* 525 F.3d at 729; *Arnold,* 421 F.3d at 866 (*citing Davis,* 512 U.S. at 459).

Petitioner did not indicate that he had nothing to say or that he wished to remain silent; rather, he clearly stated "no" in response to Oania's question whether he understood his rights. Petitioner's response would not have caused a reasonable officer under the circumstances to understand anything more than that he "might" have wanted to invoke either his right to remain silent or another right accorded by *Miranda.* Accordingly, it was not required that all questioning cease at that time. *Shi,* 525 F.3d at 729; *Arnold,* 421 F.3d at 866.

Petitioner maintains that his statement that he did not understand his rights "was nothing but an affirmation of his right to remain silent." (Petition, P&A at 20.) Both the trial court and state appellate court, however, reached the opposite conclusion, which is well-supported in the record based on the circumstances of the arrest and subsequent interview. Petitioner's contrary interpretation of the statement at issue does not sufficiently show that the state

courts' interpretation was an unreasonable determination of the facts in light of the evidence presented. Petitioner never indicated a desire to remain silent, as required to invoke the right. No clearly established federal law requires that all interrogation cease after an individual indicates that he does not understand his rights. The state appellate court's rejection of petitioner's *Miranda* claim is not contrary to, or an unreasonable application of, federal law as determined by the Supreme Court.

B. Voluntariness of the statements

To be admissible for any purpose, a statement cannot be the product of any force or threats by the government. *Arizona v. Fulminante,* 499 U.S. 279, 287-88 (1991). The United States Constitution demands that confessions be made voluntarily in order to be admissible at trial. *Lego v. Twomey,* 404 U.S. 477, 478 (1972). A confession is voluntary if it is "the product of a rational intellect and a free will." *Medeiros v. Shimoda,* 889 F.2d 819, 823 (9th Cir. 1989) (quoting *Townsend v. Sain,* 372 U.S. 293, 307 (1963)); *see also Blackburn v. Alabama,* 361 U.S. 199, 208 (1960). The test for voluntariness, however, is not a simple question of whether the suspect spoke of free will. Rather, "coercive police activity is a necessary predicate to the finding that a statement or confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly,* 479 U.S. 157, 167 (1986).

Petitioner alleges that the *Miranda* waiver he gave to Detective Bielcik and his subsequent statements were involuntary. Petitioner asserts that his "will was broken down" and that Bielcik obtained the waiver only "[b]y ignoring petitioner's statements that he did not want to talk." (Petition, P&A at 22.)

The relevant question is whether it appears, by preponderance of the evidence, that petitioner's statements were the result of his will being overborne by coercive police conduct. *Arizona v. Fulminante,* 499 U.S. 279, 288 (1991) (whether defendant's statement is "the product of coercion" by law enforcement depends on whether his "will was overborne"); *Connelly,* 479 U.S. at 168 (reaffirming that "the voluntariness of a confession need only be established by a preponderance of the evidence"). The inquiry must be based on the totality of the circumstances. *See Winthrow v. Williams*, 507 U.S. 680, 711-12 (1993). Relevant factors to consider may include the youth of the accused, lack of education, low intelligence, lack of advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, or the use of physical punishment such as deprivation of food or sleep). *Schneckloth v. Bustamonte,* 412 U.S. 218, 226 (1973).

In this case, the only *Schneckloth* factor alleged by petitioner is a repeated and prolonged attempt by Bielcik to question him. With regard to this factor, the interview transcript shows that, after obtaining petitioner's unhesitating response to some background questions (including his name, address, age,

work, education, health, arrest and substance abuse history), and ensuring that petitioner was oriented, Detective Bielcik continued:

> [Detective:] What I wanted to do was kind of give you a chance to tell your side of the story if you want, you are not obligated to, but since . . .
>
> [Petitioner:] Can I talk to [the victim]?
>
> [Detective:] They are still looking at her right now.
>
> [Petitioner:] Looking at her?
>
> [Detective:] Examining her. They have to wait for a doctor. They are backed up. So it's up to you if you want to talk to me. You are not obligated to. But since you are under arrest, I have to advise you of you[r] rights.
>
> [Petitioner:] I'd rather talk to her. You can be with me. In front of us or whatever.
>
> [Detective:] Well, to be honest with you, that's not going to happen, because it's going to be forever until she is around.
>
> [Petitioner:] What? Say that again?
>
> [Detective:] It's going to be a long, long, long time until they are done with her at the hospital.
>
> [Petitioner:] Really. How long is that?

> [Detective:] I don't know. Rest assured that it will be a long time. It will be sometime tonight, you know?
>
> [Petitioner:] What time is it, about eleven?
>
> [Detective:] Coming up on 9:30. So basically what I want to do . . . We'll go over it again like we did before with the other. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to an attorney and have an attorney present before and during questioning and if you cannot afford an attorney, one will be appointed free of charge to represent you before and during questioning. Do you understand each of these rights I have explained to you?
>
> [Petitioner:] Yes.
>
> [Detective:] With that in mind, do you want to talk to me now?
>
> [Petitioner:] I'll talk to you.

(CT at 353-54.)

Bielcik's conduct and statements as set forth above do not fall within the realm of coercive police conduct established by existing Supreme Court precedent. *C.f. Mincey v. Arizona*, 437 U.S. 385 (1978) (defendant subjected to 4-hour interrogation while incapacitated and sedated in intensive-care unit); *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (defendant, on medication, interrogated for over 18 hours without food or sleep); *Beecher v. Alabama*, 389 U.S.

35 (1967) (police officers held gun to the head of wounded suspect to extract confession); *Davis v. North Carolina,* 384 U.S. 737 (1966) (16 days of interrogation in closed cell without windows and with limited food); *Reck v. Pate,* 367 U.S. 433 (1961) (defendant held for four days with inadequate food and medical attention until confession obtained); *Culombe v. Connecticut,* 367 U.S. 568 (1961) (defendant held for five days of repeated questioning during which police employed coercive tactics); *see also Colorado v. Connelly,* 479 U.S. at 164 (noting that all Supreme Court decisions finding a confession to be involuntary "have contained a *substantial* element of coercive police conduct") (emphasis added).

Moreover, it does not appear that petitioner's will was overborne. Rather, as the California Court of Appeal determined, the transcript demonstrates that petitioner

> "clearly want[ed] to talk to the officer" and had "become interested in letting the officer hear his side of the story." He called the officer by first name, willingly gave extensive background information, and at no point appeared unwilling to speak to the detective, even after receiving his *Miranda* advisements. We do not construe his interest in speaking to the victim as an attempt to avoid or defer an interrogation, as he invited the detective to be present.

(C048693 opinion at 12-13.)

The state appellate court concluded that petitioner's statements to Bielcik were voluntary. (C048693 opinion at 13.) Upon the record of this case, this determination is not contrary to, or an unreasonable application of, any federal law as set forth by the Supreme Court. Nor is it based on an unreasonable determination of the facts in light of the evidence. Petitioner is not entitled to habeas corpus relief.

V. CONCLUSION

For all the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's application for writ of habeas corpus be DENIED.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst,* 951 F.2d 1153 (9th Cir. 1991).

DATED: March 26, 2009

/s/ Charlene H. Sorrentino
Charlene H. Sorrentino
United States
Magistrate Judge

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT
(Sacramento)

- - - -

THE PEOPLE, Plaintiff and Respondent, v. LLOYD PHILIP LOCKE, Defendant and Appellant.	C048693 (Sup.Ct.No. 03F08925) (Filed Apr. 28, 2006)

Defendant Lloyd Philip Locke entered a negotiated plea of no contest to six counts of committing forcible and nonforcible lewd acts on his daughter (Pen. Code, § 288, subds. (a), (b)), and one count of making a criminal threat (Pen. Code, § 422), as to which it was also alleged he personally used a firearm (Pen. Code, §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)).

He contends on appeal his statements during a police interrogation were unlawfully elicited in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*), and were otherwise involuntary. We disagree and shall affirm the judgment.

BACKGROUND

Following a fight with her father (the defendant), the 17-year-old victim reported he had assaulted her with a knife and a stick, had pointed guns at her, and had fired at least one of them. She drew a map of the house, identifying where the weapons could be found, and consented to a search of the house for weapons. She also told officers defendant had been sexually molesting her since she was five.

Deputies contacted defendant around 3:30 p.m. He admitted threatening his daughter with a knife and admitted drinking whisky after fighting with her. He had a strong odor of alcohol, spoke quickly, and moved from side to side as he spoke.

Placed under arrest for assault with a deadly weapon, making criminal threats, and child abuse, defendant consented to a search of the house for weapons.

When Deputy Oania read defendant his *Miranda* rights and asked if he understood them, defendant responded, "No." Deputy Oania checked the "No" box on the written *Miranda* advisement form next to the question, "Do you understand each of these rights I have explained to you?" and wrote "Oania" on the form. Deputy Oania did not question defendant further.

Deputies searched the house, located the knife and stick where both defendant and his daughter had

indicated they could be found, found three firearms, and discovered bullet holes inside the residence.

Meanwhile, defendant remained in custody and Detective Bielcik, aware of the allegations of sexual abuse, pressed defendant to provide consent to an unrestricted search of the house. At approximately 7:20 p.m., defendant consented to an unrestricted search of the house.

Deputies conducted a second, complete search of the house between approximately 8:00 and 10:00 p.m., during which they seized homemade videotapes depicting sex acts.

Simultaneously, Detective Bielcik began to interview defendant. Defendant reported he had snorted $20 worth of crank at about 2:00 a.m. that morning, drank about four ounces of whiskey shortly after noon, smoked marijuana at about 3:00 in the afternoon, but stated he no longer felt under the influence of any substance. At about 9:30 p.m., Detective Bielcik re-*Mirandized* defendant.[1] Bielcik "slowly" read the advisement form to defendant, who responded that he understood his rights. Defendant said, "I'll talk to you," signed the waiver form, and initialed statements that he understood his rights and, with those rights in mind, wished to speak to officers.

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[1] Detective Bielcik knew "patrol officers had [previously] read [defendant] his rights. They asked him if he understood, he said no, and patrol officer[s] stopped."

Defendant then told Detective Bielcik that he and the victim were consensual "sexual partners" and had engaged in sex acts "uncountable times," beginning when she was six and a half years old and continuing until the day before his arrest.[2]

He was charged with 39 counts of sex offenses committed between 1991 and 2003 (including rape, lewd acts, and oral copulation), two counts of felony assault, and one count of making a criminal threat.

Defendant moved to suppress (1) the nonweapon evidence seized from his home and (2) his confession to Detective Bielcik, arguing that his statements and his second, unqualified consent to search were involuntary products of coercion by Detective Bielcik. He also asserted that he had invoked his right to remain silent when he received the first *Miranda* advisements from Deputy Oania, thereby rendering unlawful Detective Bielcik's reinitiating questioning.

After a hearing, the trial court granted defendant's motion to suppress evidence found in the second search of his house, on the ground defendant's unqualified consent to search his house was involuntary because defendant consented only after trying "no less than 28 times" to avoid doing so, thereby compelling the inference defendant "no longer felt free to decline the repeated requests[.]"

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[2] The victim was pregnant at the time of defendant's arrest, and tests later established defendant was the father.

But the court denied defendant's motion to suppress his statements to Detective Bielcik. The court noted that when defendant was first read his *Miranda* rights by Deputy Oania in the afternoon, he showed evidence of intoxication and neither invoked his right to remain silent nor requested an attorney. After several hours had passed and "the effects of the alcohol and drugs [were allowed] to dissipate," Detective Bielcik did not act improperly in *re-Mirandizing* defendant, or in taking his statement after defendant responded "I'll talk to you" and signed the waiver.

Defendant eventually entered negotiated pleas of no contest to four counts of committing forcible lewd acts on the victim (Pen. Code, § 288, subd. (b)), two counts of nonforcible lewd acts (Pen. Code, § 288, subd. (a)), and one count of making a criminal threat (Pen. Code, § 422), as to which it was also alleged he personally used a firearm (Pen. Code, §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)), in exchange for dismissal of the remaining counts and a stipulated prison sentence of 49 years.[3]

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[3] The court later granted defendant's request to withdraw his plea and to enter a "slow plea on stipulated facts" to the same charges and with the stipulated same sentence, so as to preserve defendant's right to challenge the court's denial of his motion to suppress his statement to Detective Bielcik.

DISCUSSION

Defendant contends his statements to Detective Bielcik should have been excluded because he invoked his right to silence during the earlier exchange with Deputy Oania, and Bielcik violated *Miranda* by reinitiating questioning. He also contends his statements were involuntary. We disagree with both contentions.

I

"Under the familiar requirements of *Miranda*, . . . a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent." (*People v. Sims* (1993) 5 Cal.4th 405, 440, limited on other grounds in *People v. Storm* (2002) 28 Cal.4th 1007, 1031-1037.) "Once having invoked these rights, the accused 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" (*People v. Sims, supra,* 5 Cal.4th at p. 440, citing *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [68 L.Ed.2d 378, 385-386].)

Defendant contends, by telling Deputy Oania he did not understand his *Miranda* rights, he made "a metaphoric, but clear, assertion of his right to remain silent." Because Detective Bielcik disregarded that

prior invocation of the right to remain silent, his subsequent statements to Detective Bielcik are inadmissible and his conviction must be reversed. (*Edwards v. Arizona, supra,* 451 U.S. 477, 485-487 [68 L.Ed.2d 378, 386-388]; *Miranda, supra*, 384 U.S. at pp. 473-474 [16 L.Ed.2d at p. 723].)

In evaluating a claim of whether a defendant invoked his right to remain silent under *Miranda,* we accept the trial court's factual findings and evaluations of credibility if supported by substantial evidence. (*People v. Box* (2000) 23 Cal.4th 1153, 1194.) While we must undertake an independent review of the record to determine whether the right to remain silent was invoked (*People v. Jennings* (1988) 46 Cal.3d 963, 979), we also "'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence." (*Ibid. People v. Wash* (1993) 6 Cal.4th 215, 235-236.) Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context. (*Fare v. Michael C.* (1979) 442 U.S. 707, 725 [61 L.Ed.2d 197], *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.)

Although a suspect's assertion of the privilege against self-incrimination need not be "unequivocal" (*People v. Thompson* (1990) 50 Cal.3d 134, 165) or "invoked with unmistakable clarity" (*People v. Randall* (1970) 1 Cal.3d 948, 955, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510,

fn. 17), it must be something more than "metaphorical," as defendant suggests. The court found defendant "never indicated a desire to remain silent" and "did not invoke his right to remain silent." Viewed in context, we agree with the court that defendant's "no" response when asked if he understood the recitation of his *Miranda* rights did not constitute an invocation of his right to silence. (Cf. *People v. Musselwhite, supra,* 17 Cal.4th at p. 1238.) In fact, defendant's response to Deputy Oania cannot be characterized even as an equivocal assertion of that right.

Far from suggesting a subtle use of metaphors, evidence supports the court's finding defendant may have failed to understand the *Miranda* advisements because he was intoxicated. The court credited Deputy Oania's observations that – when first advised of his *Miranda* rights – defendant smelled of alcohol, spoke quickly, and moved from side to side, and found defendant was then "under the influence . . . [and] highly agitated." Defendant himself admitted he had been drinking a few hours before.

Defendant insists we must construe his response as an invocation because "the patrol officers who had contact with [defendant] treated it as an invocation" and Detective Bielcik likewise "operated under the assumption that there had been an invocation" by defendant upon his first advisement in the afternoon. Our review of the record is to the contrary: nothing in the record indicates any officer believed defendant ever invoked his right to remain silent.

Instead, like the trial court, we infer from the fact that defendant was not interrogated after Deputy Oania attempted to advise him of his rights that Oania believed defendant could not evaluate *whether* to waive his right to remain silent, not that he *had* invoked it. Officers properly refrained from addressing the matter further with defendant until defendant "had a chance to calm down. . . . [and] sober up[,]" and could understand the recitation of *Miranda* advisements. "It is only through an awareness of these consequences [that anything said can and will be used against the individual in court] that there can be any assurance of real understanding and intelligent exercise of the privilege." (*Miranda, supra,* 384 U.S. at p. 469 [16 L.Ed.2d at p. 721].) Indeed, had Deputy Oania proceeded with further attempts to *Mirandize* defendant and/or take his statement, he might have exposed deputies to a claim they attempted to exploit defendant's intoxicated state. (Cf. *People v. Markham* (1989) 49 Cal.3d 63, 67; *People v. Fowler* (1980) 109 Cal.App.3d 557, 563.)

There was no *Miranda* violation.

II

"Under both state and federal law, courts apply a 'totality of the circumstances' test to determine the voluntariness of a confession." (*People v. Massie* (1998) 19 Cal.4th 550, 576.) When addressing such claims, the ultimate question is "'whether defendant's choice to confess was not "essentially free" because

his will was overborne.'" (*Ibid.;* see also *People v. Williams* (1997) 16 Cal.4th 635, 660.) The People have the burden of demonstrating voluntariness by a preponderance of the evidence. (*Massie, supra,* at p. 576; *People v. Whitson* (1998) 17 Cal.4th 229, 248.)

Although this issue is independently reviewed on appeal, appellate courts "'"give great weight to the considered conclusions"'" of lower courts. (*People v. Whitson, supra,* at p. 248; see also *People v. Wash* (1993) 6 Cal.4th 215, 235-236.) Among the factors to be considered are "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' [Citation.]" (*People v. Williams, supra,* 16 Cal.4th at p. 660.) The giving of *Miranda* warnings is relevant evidence on the issue of whether the questioning was in fact coercive. (*Beckwith v. United States* (1976) 425 U.S. 341, 348 [48 L.Ed.2d 1, 8].)

Here, the court declined to find defendant's admissions to Detective Bielcik were involuntary: "[T]here is no showing of gamesmanship as it relates to *Miranda*. [¶] Defendant was cooperative with officers at all times."

True, the court did find defendant's unqualified consent to search was involuntary because "[a] review of the transcripts reveals no less than 28 times

[defendant] evaded, refused, or questioned Detective Bielcik's request for full consent."[4]

On appeal, defendant contends his consent to talk must likewise be deemed involuntary: he insists his will to refuse to speak to Detective Bielcik "was broken down by a litany similar to that used to obtain the consent to search, relying on a deflection of [his] resistance."

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[4] "In response to his repeated question, 'Will you give consent,' Mr. Locke said, 'For what?' 'I'd like to be there.' 'I just don't want you going over there at all.' 'I don't want to authorize a search without me being there.' 'It seems excessive to search my house.' 'If I don't have to, I would rather not.' 'I'd rather not.' 'They've already been in the house.' 'If I can be there when you do it.' 'What are you looking for?' 'You want me to consent without being there?' 'When do you want to search?'

"He said, 'Before they decide to take a look, I would like to figure out when I'm going to get out.' 'I want to go back and check.' 'I don't want to make that decision until I know when I'm getting out.' 'How long would it take for a search warrant?' 'You're not going to release me until you see the house.' 'Why not search before?' 'Did someone make a mistake?' 'Did they have me sign the wrong paper?' 'Why are we doing this again?' He asked 'why' again.

"He asked, 'Was the prior consent legally obtained?' He suggested the first one must not have been lawful. 'Did they mess up the first time?' 'I don't understand why I have to sign again.' 'Seems like they made a mistake.' 'It seems it was not legal.'

"At this point the defendant did sign, but the Court finds he no longer felt free to decline the repeated requests; and, therefore, the Court is ruling that consent was not voluntary."

Our review of the interview transcript belies this characterization. After obtaining defendant's unhesitating response to some background questions (including his name, address, age, work, education, health, arrest and substance abuse history), and ensuring that defendant was oriented, Detective Bielcik continued: "What I wanted to do was kind of give you a chance to tell your side of the story if you want, you are not obligated to, but since. . . .

"[Defendant]: Can I talk to [the victim]?

"Detective: They are still looking at her right now.

"[Defendant]: Looking at her?

"Detective: Examining her. They have to wait for a doctor. They are backed up. So it's up to you if you want to talk to me. You are not obligated to. But since you are under arrest, I have to advise you of your rights.

"[Defendant]: I'd rather talk to her. You can be with me. In front of us or whatever.

"Detective: Well to be honest with you, that's not going to happen, because it's going to be forever until she is around.

"[Defendant]: What? Say that again?

"Detective: It's going to be a long, long, long, long time until they are done with her at the hospital.

"[Defendant]: Really. How long is that?

"Detective: I don't know. Rest assured that it will be a long time. It will be sometime tonight, you know?

"[Defendant]: What time is it, about eleven?

"Detective: Coming up on 9:30. So basically what I want to do . . . We'll go over it again like we did before with the other. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to an attorney and have an attorney present before and during questioning and if you cannot afford an attorney, one will be appointed free of charge to represent you before and during questioning. Do you understand each of these rights I have explained to you?

"[Defendant]: Yes.

"Detective: With that in mind, do you want to talk to me now?

"[Defendant]: I'll talk to you." Almost immediately after this exchange, defendant admitted having sex with the victim "uncountable times."

We concur with the trial court's assessment that defendant "clearly want[ed] to talk to the officer" and had "become interested in letting the officer hear his side of the story." He called the officer by first name, willingly gave extensive background information, and at no point appeared unwilling to speak to the detective, even after receiving his *Miranda* advisements. We do not construe his interest in speaking to the

victim as an attempt to avoid or defer an interrogation, as he invited the detective to be present.

Defendant's statements to Detective Bielcik were voluntary.

DISPOSITION

The judgment is affirmed.

MORRISON, J

We concur:

RAYE, Acting P.J.

BUTZ, J.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LLOYD PHILLIP LOCKE, Petitioner-Appellant, v. MICHAEL EVANS, Respondent-Appellee.	No. 09-16045 D.C. No. 2:07-cv-00130-MCE-CHS Eastern District of California, Sacramento ORDER (Filed Jun 25, 2010)

Before: HUG, RYMER and McKEOWN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Rymer and McKeown have voted to deny the petition for rehearing en banc, and Judge Hug has so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.